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Juspersal

January 1, 1988

#### CONTRACTS QUARTERLY

## NEWPORT NEWS CHALLENGES HAZARDOUS WASTE CLAUSE

On December 11, 1987, Newport News Shipbuilding (NNS), Newport News, VA filed a protest with the General Accounting Office (GAO) alleging the clause pertaining to the disposal of hazardous waste from the repair or maintenance of naval vessels contained in the solicitation for the repair of the RADFORD is "inappropriate, illegal and contrary to the intent of the Congress." NNS requested that GAO prohibit NAVSEA from awarding a contract for the repair of the vessel pursuant to the solicitation while the offensive clause remains in the solicitation.

By way of background, the governing statute (10 U.S.C. 7311) provides, among other things, that "a contract...for repair or maintenance of a naval vessel [shall include]... provisions mutually acceptable to the Navy and the contractor specifying the responsibilities of the Navy and removal, handling, contractor...for the transportation, and disposal of hazardous wastes generated during the performance of the repair or maintenance." total disregard of this explicit congressional mandate, the clause inserted in the solicitation by NAVSEA stated that the contractor shall "assume all generator responsibilities under the Resource Conservation and Recovery Act" for hazardous "generated by either party during the period of performance of this Job Order."

In its protest, NNS argued:

"The Resource Conservation and Recovery Act (RCRA) 42 U.S.C.A. Sec. 6901, et seq., provides for complete chain of custody to account for waste from the time it is generated until final disposal. EPA regulations, 40 C.F.R. Sec. 262.12, require that the actual generator of hazardous waste provide its EPA identification number for the EPA Manifest Form. With the EPA Identification Number ('generator number') goes the liability for any loss, pollution, or damage caused by the waste.

"Further, the Comprehensive Environmental Response, Compensation and Liability Act, as amended (CERCLA or

#### PIERSON, BALL & DOWD

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\* Not a Member of the D.C. Sei

December 11, 1987

#### BY HAND

General Counsel
General Accounting Office
Washington, D.C. 20548

Attn: Procurement Law Group

e: Protest by Newport News Shipbuilding and Dry Dock Company (NNS) to Solicitation Issued by Naval Sea Systems Command, U.S. Department of the Navy (Navy), dated June 29, 1987 (Ref. RFP No. N00024-87-R-8515) and to any award pursuant thereto.

Newport News Shipbuilding and Dry Dock Company, 4101 Washington Avenue, Newport News, Virginia, 23607, hereby protests the above-referenced solicitation and any award pursuant thereto.

## A. Background of the Navy Solicitation

The United States Department of the Navy issued the above-referenced solicitation to NNS to submit by December 14, 1987, a fixed-price, performance fee-type proposal to perform repair services on the U.S.S. RADFORD.

On November 17, 1987, the Navy issued Amendment A00010 to the solicitation. Amendment A00010 called for "best and final" proposals to be submitted by 2:00 PM on December 14, 1987. Amendment A00010 included one hundred thirty-three (133) changes to the Specifications included in the solicitation, one of which is the subject of this protest.

General Counsel December 11, 1987 Page Two

Specification Item Number 077-00-001, entitled "Hazardous Waste Produced on Naval Vessels at Contractor Facility; handling and disposal," is attached as Exhibit A. Paragraphs 3.2 and 3.2.2 of the Specification Item state that the Contractor shall "remove, handle, store, transport and dispose of hazardous waste identified below . . . produced by Government personnel." The Contractor is directed by paragraph 3.1 to use its EPA "generator number" on the applicable Waste Manifest Form for the disposal of such wastes. Finally, paragraph 3.8 states that the Contractor shall "assume all generator responsibilities under the Resource Conservation and Recovery Act (RCRA)" for hazardous waste "generated by either party during the period of performance of this Job Order."

### B. Legal and Factual Grounds for Protest

1. The Specification Item's assignment of "all generator" responsibilities to the contractor for hazardous waste generated by Government personnel is contrary to federal law and to Environmental Protection Agency regulations.

The Resource Conservation and Recovery Act (RCRA) 42 U.S.C.A. Sec.6901, et seq., provides for complete chain of custody to account for waste from the time it is generated until final disposal. EPA regulations, 40 C.F.R. Sec.262.12, require that the actual generator of hazardous waste provide its EPA identification number for the EPA Manifest Form. With the EPA Identification Number ("generator number") goes the liability for any loss, pollution, or damage caused by the waste.

Further, the Comprehensive Environmental Response, Compensation and Liability Act, as amended (CERCLA or Superfund), 42 U.S.C.A. Sec.9601, et seq., provides for "cradle to grave" liability for any entity that stores, generates, transports, arranges for disposal, or disposes of hazardous wastes. The result of the Navy attempting to shift its legal responsibilities onto its contractors is that contractors could be forced to pay for the clean up disposal sites to which they sent Government generated waste many years before. Since Superfund liability is assessed without regard to fault or negligence, contractors could be made liable simply because their generator number appeared on the Manifest Form in place of the Government's.

#### PIERSON, BALL & DOWD

General Counsel December 11, 1987 Page Three

- 2. The EPA Hazardous Waste Manifest, 40 C.F.R. Sec.262 Appendix, requires an official of the generator to sign a statement certifying that waste minimization procedures were followed in the production of the wastes. Only the actual generator can legally sign this statement, since another party (such as a contractor) would have no control over the processes that produced the waste. 40 C.F.R. Sec. 262.23 states that the generator must sign the manifest certification by hand.
- 3. The term, "hazardous waste," is a term of art defined by RCRA. See 40 C.F.R. Sec.261. Hazardous wastes are identified by listings in EPA's regulations, by EPA criteria for toxicity, etc., and by being designated as such by the generator of the waste, who is in the best position to know its contents. See 40 C.F.R. Sec.262.11. The Specification Item lists as hazardous waste several items which might otherwise not be considered hazardous waste. Asbestos, for example, is not considered a hazardous waste by EPA. Also, bilge water and several other items may or may not contain chemicals that would render the waste hazardous. By identifying all of these wastes as hazardous, the Navy has committed itself to following the more stringent (and costly) handling and disposal requirements of RCRA.
- 4. The imposition of requirements for handling of hazardous waste by means of Specification Item No. 077-00-001 is not authorized by the provisions of 10 U.S.C. Sec.7311, "Repair or maintenance of naval vessels: handling of hazardous waste." Sec.7311(a)(3) states that "a contract . . . for repair or maintenance of a naval vessel [shall include] . . . [p]rovisions mutually acceptable to the Navy and the contractor specifying the responsibilities of the Navy and the contractor . . . for the removal, handling, storage, transportation, and disposal of hazardous wastes generated during the performance of the repair or maintenance." That statuts does not give the Navy the authority to include solicitation requirements that violate the express mandates of RCRA or CERCLA, as the Navy is attempting to do in this case.
- 5. The Specification Item, in Sections 3.2.2.1 and 3.2.2.2, lists generic types of "hazardous waste" expected. These listings are not in compliance with 10 U.S.C. 7311(a)(1), since the listed items are not specific enough to enable the contractor to determine the identity of possible hazardous components. The result is that handling of the items cannot be priced.

General Counsel December 11, 1987 Page Four

- 6. The Specification's failure to identify any specific chemical components of the waste material means that the Contractor cannot determine whether it is licensed to handle the waste under state and federal environmental permits. See 10 U.S.C. Sec.7311(a)(1).
- 7. Based on the foregoing facts and reasons, the Contracting Officer does not have the authority to enter into a contract which would contain Specification Item 077-00-001. Federal Acquisition Regulation (FAR) Part 1.602-1 mandates in pertinent part:
  - (b) No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.

Furthermore, to include this specification would mean the Contracting Officer would be spending federal funds for an illegal purpose, namely the violation of federal environmental laws and regulations.

In summary, the inclusion of Specification Item 077-00-001 in the solicitation is contrary to applicable procurement and environmental laws and results in creating a situation where it is impossible for an offeror to fully understand or fully price the scope of this procurement.

## C. Request for Conference

Pursuant to 4 C.F.R. Sec.21.5, NNS hereby requests a conference on the merits of this protest after receipt of the Navy's report hereon.

D. Request for Ruling by the Comptroller General of the United States; Form of Relief

NNS hereby specifically requests a ruling on this protest by the Comptroller General of the United States and that the Comptroller General rule hereon that (a) the form and content of Specification Item 077-00-001 is inappropriate, illegal and contrary to the intent of the Congress and (b) no award of any

General Counsel December 11, 1987 Page Five

contract shall be made pursuant to this solicitation as presently written.

## E. Delivery of Protest to Department of the Navy

NNS has made several good faith efforts to resolve this matter directly with the Navy's Contract Specialist and, indirectly through her, with the Contracting Officer. Unfortunately NNS has only been able to obtain a recommendation that they proceed by submitting a proposal with an exception. They were not, however, able to obtain any assurances that to do so would not disqualify them for being nonresponsive.

A copy of this protest is being simultaneously hand delivered to Mr. R. L. Straight, Contracting Officer, Naval Sea Systems Command, U.S. Department of the Navy in Washington, D.C.

Sincerely,

PIERSON, BALL & DOWD

Caryl A. Potter, III

Attorney for Newport News Shipbuilding and Dry Dock Company

Enclosures



## DEPARTMENT OF THE NAVY

NAVAL SEA SYSTEMS COMMAND WASHINGTON DC 20362 5101

INCLOSURI(13)

O7/1 JMJ

4330

OPR: 0281/RJW Ser: 028/1414

JAN

N 7 1988

From: Commander, Naval Sea Systems Command

Subj: DISPOSAL OF HAZARDOUS WASTE

Ref:

(a) NAVSEA Standard Specification Committee letter 4121.1A, Ser 105/4559 of 6 October 1987, Subj: Mandatory Changes to FY 1988 NAVSEA Standard Items (SI's) (CH-3) and NAVSEA Standard Work Items

Encl: (1) Contract Clause "Disposal of Hazardous Wastes"

- 1. Included in the 1987 Authorization Act is a requirement that the Navy identify hazardous waste generated as a result of ship repair contracts. The Act also requires compensation to contractors and the determination of responsibility for removal, handling, storage, transportation, and disposal of hazardous waste.
- 2. By reference (a). Standard Work Items 077-01 and 077-02 were issued. These items provide for the identification, removal, handling, storage, transportation, and disposal of hazardous waste in ship repair contracts. Enclosure (1) has been de eloped to provide the contractual coverage in ship repair contracts for the determination of liability and responsibility.
- 3. You are requested to include enclosure (1) in Section H of solicitations for ship repair work under job orders issued under the Master Agreement for Repair and Alteration of Vessels. The clause should be included in the solicitation when removal, handling, storage, transportation, or disposal of hazardous waste may be involved in the job order.
- 4. The point of contact on this matter at NAVSEA is Ray West on (202) 692-0067 or Autovon 222-0067.

CAPT D. W. ALLEN BY DIRECTION

Copv to: SEA 071 SEA 0285

Distribution List: SNUL FKE'8 SUPSHIPS (Code 400) RESUPSHIP San Juan (Contracts Dept.) INDMAN Pearl Harbor (Code 221.4)

## NOTE

(Superfund) arrange for disposal regardles.

RCRA - makes us liable whenever we use our generator #!

"Specialists in the Repair. Modernization and Maintenance of Seagoing Vessels"

1300 Crystal Drive, Suite 1709S Arlington, Virginia 22202 / (703) 979-2270 / Telex: 901857 HQ AGTN

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Kegards. Bol

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#### MEMORANDUM

TO:

Vicki Middleton

FROM:

Bob Bates

DATE:

March 14, 1988

Serial: 8803-148

SUBJECT:

Language for Hazardous Waste

#### Vicki:

Questions on Hazardous Waste Generated During Repair of Navy Vessels

A few years ago, you successfully promoted into lew (10 USC 7311) a provision that requires the Secretary of the Navy to ensure the Navy's repair or maintenance contracts include (i) express provisions identifying the type and amount of hazardous wastes expected to be generated in the course of ship repair; (ii) provisions specifying the contractor shall be compensated under the contract for work performed in disposing of hazardous wastes; and (iii) "mutually acceptable" provisions in specifying the responsibilities of the Navy and the contractor for the disposal of hazardous wastes generated during the repair or maintenance.

- The Navy has not developed or issued a standard work item to implement this law, instead they keep issuing work items contrary to the law.
- 2. There have been extreme problems with specificity of the amounts and types of hazardous wastes contrary to the provisions of the law. In addition the Navy has failed to identify specific chemical components of waste material. This means that contractors cannot determine whether it is licensed to handle the wastes or what the disposal costs might be. We need to fix that in this years authorization.
- I further understand that the Navy is seeking to have the contractor use its generator number and assume all generator

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Memo Page Two March 14, 1988

responsibilities under the Resource Conservation and Recovery Act. This simply does not make any sense and is particularly unfair where the hazardous wastes were generated by the Navy's ship force.

4. Another problem concerns hazardous wastes generated jointly by the Navy and the contractor. The statutory language and simple equity dictates that the Navy should provide express indemnification for at least a pro rata share of liability incurred by the contractor.

#### RECOMMENDATION

Language needs to be added to require the Navy to use their generator number on hazardous wastes removed from onboard ship.

The provisions also should require the Navy to identify specific chemical components of the generated waste to allow contractors to determine the adequate disposal provisions and costs.

Regards,

Bob Bates

RMB/kb



1110 Vermont Avenue, N.W. Washington, D.C. 20005-3553 202-775-9060 CC: ART
HERB
LARL Handon
BILL Johnston
AI Santon
BEAD Fridette
Mike McKegwa

May 10, 1988

To:

ENVIRONMENTAL CONTROL COMMITTEE

Subject: Status Report on Hazardous Waste (Nevy)

CRAIT MY, 1/A
BUN White
DAVE BENDIN
DICK CAMBONS
Fole:

On May 9, 1988, John Wittenborn and I met with Nancy S. Stehle, Deputy Director, Environment, Office of the Assistant Secretary of the Navy (Shipbuilding and Logistics), concerning NAVSEA's Standard Work Item for Hazardous Waste. One of the subjects discussed was Mr. Wittenborn's proposed revisions to the standard work item as well as the Navy's commitment to undertake its responsibilities in the area of hazardous waste.

- As to hazardous waste generated by the vessel, the Navy will adopt a policy that it will remove and dispose of such waste before the ship enters the private shipyard. If the ship personnel fail to remove such waste, the contractor should ask the appropriate Navy contact to remove the waste from the yard.
- B. As to hazardous waste discovered by the private shipyard in the course of the overhaul or repair, the contractor should use the Change Clause to seek reimbursement for the costs of removal and disposal of such waste
- C. As to chemically analyzing a waste to determine whether it is hazardous, the Navy would like information as to how often does the contractor perform such tests in the course of an overhaul or repair. Also, does it make sense to assume, lets say five chemical tests per job, and the contractor bids accordingly. If more tests are required, the contractor would be compensated.
- D. As to cogeneration of hazardous waste by the Navy and the contractor, the Navy appears to accept its prorata share of liability. This issue needs to be explored more thoroughly with the Navy.
- E. As to hazardous waste soley generated by the ships force while undergoing overhaul or repair, the Navy appears to be receptive of the concept of the contractor acting as agent for the Navy. This would relieve the contractor of liability for such waste.

The Navy indicated the subject of Standard Work Item for Hazardous Waste could be revisited at the Ship Standards, Specifications, Repair, and Alterations Committee at its June meeting in Jacksonville, FL. Obviously, this matter will have to be discussed before the meeting.

W. Patruli maris

W. Patrick Morris Vice President & General Counsel 1110 Vermont Avenue, N.W. Weshington, D.C. 20005-3553 202-775-9060

April 19, 1988

Dear Nancy:

Pursuant to our conversation of April 19, enclosed please find a revised Standard Work Item on Hazardous Waste. John Whittenborn and I look forward to meeting with you to discuss the draft on May 9.

Sincerely,

W. Patrick Morris Vice President & General Counsel

Ms. Nancy S. Stehle
Deputy Director, Environment
Office of the Assistant Secretary
of the Navy (Shipbuilding & Logistics)
Department of the Navy
Crystal Plaza 5
Washington, DC 20360

Enclsoure: as stated



1110 Vermont Avenue, N.W. Washington, D.C. 20005-3553 202-775-9060

May 10, 1988

To:

ENVIRONMENTAL CONTROL COMMITTEE

Subject: Status Report on Hazardous Waste

On May 9, 1988, John Wittenborn and I met with Nancy S. Stehle, Deputy Director, Environment, Office of the Assistant Secretary of the Navy (Shipbuilding and Logistics), concerning NAVSEA's Standard Work Item for Hazardous Waste. One of the subjects discussed was Mr. Wittenborn's proposed revisions to the standard work item as well as the Navy's commitment to undertake its responsibilities in the area of hazardous waste.

- A. As to hazardous waste generated by the vessel, the Navy will adopt a policy that it will remove and dispose of such waste before the ship enters the private shipyard. If the ship personnel fail to remove such waste, the contractor should ask the appropriate Navy contact to remove the waste from the yard.
- B. As to hazardous waste discovered by the private shipyard in the course of the overhaul or repair, the contractor should use the Change Clause to seek reimbursement for the costs of removal and disposal of such waste
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- D. As to cogeneration of hazardous waste by the Navy and the contractor, the Navy appears to accept its prorata share of liability. This issue needs to be explored more thoroughly with the Navy.
- E. As to hazardous waste soley generated by the ships force while undergoing overhaul or repair, the Navy appears to be receptive of the concept of the contractor acting as agent for the Navy. This would relieve the contractor of liability for such waste.

The Navy indicated the subject of Standard Work Item for Hazardous Waste could be revisited at the Ship Standards, Specifications, Repair, and Alterations Committee at its June meeting in Jacksonville, FL. Obviously, this matter will have to be discussed before the meeting.

W. Patruli Maris

W. Patrick Morris Vice President & General Counsel

### CONTRACT CLAUSE

The disposal of hazardous wastes by the contractor shall be in accordance with the Resource Conservation and Recovery Act (RCRA) and all other applicable Federal, State and local laws, codes, ordinances and regulations.

Where the contractor disposes of hazardous wastes which are generated solely by Navy personnel, either prior to or during the performance of ship repair work, the Navy will use its generator number, assume all RCRA generator duties and indemnify the contractor for CERCLA and RCRA liability incurred by the contractor, as long as the contractor reasonably complies with applicable federal, state and local laws, codes, ordinances and regulations. Where the contractor disposes of hazardous wastes which are generated jointly by the acts of the Navy and the contractor, and the Navy requires the contractor to use its generator identification number and perform the duties of a generator under RCRA, the Navy shall indemnify the contractor for CERCLA and RCRA liability incurred by the contractor, as long as the contractor reasonably complies with applicable federal, state, and local laws, codes, ordinances and regulations. Where the contractor disposes of hazardous wastes generated solely by the contractor, the contractor will use its generator number and assume all RCRA generator duties.

#### REVISIONS TO NAVSEA'S STANDARD WORK ITEM

## III. Requirements:

3.1

The contractor shall have and use his generator number, and perform all RCRA generator duties, in disposing of RCRA "hazardous wastes" which are generated either jointly by the acts of the Navy and the contractor, or which are generated solely by the acts of the contractor.

3.2

The Navy shall have and use its generator number, and perform all generator duties under RCRA, for RCRA "hazardous wastes" which are generated solely by the Navy either prior to or during the course of ship repair work.

3.3

The Navy shall identify in writing each RCRA "hazardous waste" that the contractor will handle, treat or dispose of in performing the ship repair work.

3.3.1

The Navy shall specify each "hazardous waste's" RCRA identification number, its location on the ship, and the amount of the "hazardous waste" that the contractor will be responsible for handling, treating, or disposing of.

3.4

Unless a waste is identified by the Navy as a "hazardous waste," the contractor shall assume that the waste is not hazardous in handling, treating and disposing of the waste.

3.5

When the contractor deems it necessary, he shall chemically analyze a waste to determine if, and to what extent, that waste contains hazardous substances.

3.5.1

The Navy shall reimburse the contractor for any costs incurred in performing chemical analysis on any waste products that the contractor handles as a part of the ship repair work.

3.6

If chemical analysis demonstrates that a waste not identified in the contract is a "hazardous waste," then the contractor shall return the waste to the Navy for handling and disposal, or the contractor shall dispose of the hazardous waste in accordance with RCRA.

3.7

If the contractor disposes of the waste rather than return the waste to the Navy for handling and disposal, the Secretary of the Navy shall renegotiate the contract so that it fully includes all costs incurred by a contractor in handling, treating, or disposing of "hazardous wastes" which the Navy did not properly identify as hazardous or which the Navy failed to specify the actual quantity of the waste which the contractor handles, treats, or disposes of.

Attorneys-at-Law
1055 Thomas Jefferson Street, N. W.
Washington, D. C. 20007

Telephone: (202) 342-8400 Writer's Direct Dial Number

#### **MEMORANDUM**

May 23, 1988

TO:

SHIPBUILDERS COUNCIL OF AMERICA ENVIRONMENTAL CONTROL COMMITTEE

FROM:

JOHN L. WITTENBORN

RE:

NAVY HAZARDOUS WASTE

Pat Morris and I have met twice with Navy representatives to discuss modifications to the Navy's standard work item and contract clause dealing with responsibility and liability for handling and disposal of hazardous wastes generated before and during ship repair work. Although significant progress has been made (see letter of Pat Morris, attached), many hurdles still remain.

#### L IDENTIFICATION OF HAZARDOUS WASTE

10 U.S.C. § 7411 requires that the Navy identify by type and amount the hazardous waste which is expected to be generated during the course of ship repair work on Navy vessels. In its Standard Work Item, the Navy has chosen to adopt several categories of waste substances (many of which may not be hazardous) and to specify amounts of such wastes in broad ranges. This practice puts an onerous burden on contractors to guess at the amount of waste likely to be hazardous or bid on a worst case assumption with a large margin of uncertainty. We have objected to this provision of this Standard Work Item and requested that the Navy identify wastes using Resource

Conservation and Recovery Act ("RCRA") or State Hazardous Waste Identification Numbers (i.e., F003, D007, etc.).

In response, the Navy argues that it cannot anticipate the generation of hazerdous wastes which are within the discretionary use of the contractor and it does not wish to be responsible for specifying the use of hazardous materials if other non-hazardous alternatives are available. The Navy has invited the Council to specify an appropriate level of detail for waste identification with which the Navy can reasonably comply and the Shipbuilders can accept. Your ideas would be appreciated.

#### IL LIABILITY ISSUES

In our discussions with the Navy, three categories of hazardous waste have been identified: (1) wastes produced by the Navy before the ship enters the yard; (2) wastes produced by ships' force during repair work in the yard; and (3) wastes produced by the contractor. As Pat's memo explains, the Navy will handle category (1) by offloading all hazardous wastes before entering private shipyards. Contractors are encouraged to refuse to handle wastes which are present on the vessel in violation of this policy.

The Navy will expect contractors to handle wastes in category (2), but will "relieve the contractor of liability" for the proper disposal of those wastes.

The liability problems associated with contractor-produced hazardous wastes are more difficult. If wastes produced by the contractor are not discretionary (e.g., "remove X amount of asbestos" or "repair equipment using specified materials or GFM"), we can argue that the Navy should be liable for the proper disposal of such wastes and treat these as we would wastes produced by the ships' force. It is not clear whether the Navy will accept this position. Certainly, however, the Navy will not accept liability for hazardous wastes generated under the control of the contractor. Thus, if the shipyard

chooses to use a chlorinated solvent in lieu of a non-hazardous solvent to clean engine parts, the Navy will not assume liability for the disposal of that waste. Moreover, the Navy does not believe that it should be required to identify that waste by type and amount. The Council must decide whether to accept or fight this interpretation.

#### IIL WASTE MANIFESTS

The Navy proposes that the contractor use a separate EPA manifest to track the disposal of wastes identified to each particular contract. These manifests should specify the contract number and the name of the ship so that the Navy's liability for disposal can be established in the future. This is not a perfect solution, but with adequate contract language, shipyards would be able to assert contribution claims against the Navy if disposal generates future CERCLA liability. Please let us know whether the use of separate manifests for each contract is feasible or acceptable.

#### CONCLUSION

A copy of our last proposed standard work item revisions is attached. Please let us know your thoughts on these or other issues as soon as possible so that we can prepare a position to deliver to the SSRAC meeting next month.

If you have any questions, please do not hesitate to call.



1110 Vermont Avenue, N.W. Washington, D.C. 20005-3553 202-775-9060

May 10, 1988

To:

ENVIRONMENTAL CONTROL COMMITTEE

Subject: Status Report on Hazardous Waste

On May 9, 1988, John Wittenborn and I met with Nancy S. Stehle, Deputy Director, Environment, Office of the Assistant Secretary of the Navy (Shipbuilding and Logistics), concerning NAVSEA's Standard Work Item for Hazardous Waste. One of the subjects discussed was Mr. Wittenborn's proposed revisions to the standard work item as well as the Navy's commitment to undertake its responsibilities in the area of hazardous waste.

- A. As to hazardous waste generated by the vessel, the Navy will adopt a policy that it will remove and dispose of such waste before the ship enters the private shipyard. If the ship personnel fail to remove such waste, the contractor should ask the appropriate Navy contact to remove the waste from the yard.
- B. As to hazardous waste discovered by the private shippard in the course of the overhaul or repair, the contractor should use the Change Clause to seek reimbursement for the costs of removal and disposal of such waste
- C. As to chemically analyzing a waste to determine whether it is hazardous, the Navy would like information as to how often does the contractor perform such tests in the course of an overhaul or repair. Also, does it make sense to assume, lets say five chemical tests per job, and the contractor bids accordingly. If more tests are required, the contractor would be compensated.
- D. As to cogeneration of hazardous waste by the Navy and the contractor, the Navy appears to accept its prorata share of liability. This issue needs to be explored more thoroughly with the Navy.
- E. As to hazardous waste soley generated by the ships force while undergoing overhaul or repair, the Navy appears to be receptive of the concept of the contractor acting as agent for the Navy. This would relieve the contractor of liability for such waste.

The Navy indicated the subject of Standard Work Item for Hazardous Waste could be revisited at the Ship Standards, Specifications, Repair, and Alterations Committee at its June meeting in Jacksonville, FL. Obviously, this matter will have to be discussed before the meeting.

W. Patruli maris

W. Patrick Morris Vice President & General Counsel 1110 Vermont Avenue, N.W. Weshington, D.C. 20005-3553 202-775-9060

April 19, 1988

Dear Nancy:

Pursuant to our conversation of April 19, enclosed please find a revised Standard Work Item on Hazardous Waste. John Whittenborn and I look forward to meeting with you to discuss the draft on May 9.

Sincerely,

W. Patrick Morris Vice President & General Counsel

Ms. Nancy S. Stehle
Deputy Director, Environment
Office of the Assistant Secretary
of the Navy (Shipbuilding & Logistics)
Department of the Navy
Crystal Plaza 5
Washington, DC 20360

Enclsoure: as stated

#### REVISIONS TO NAVSEA'S STANDARD WORK ITEM

## III. Requirements:

3.1

The contractor shall have and use his generator number, and perform all RCRA generator duties, in disposing of RCRA "hazardous wastes" which are generated either jointly by the acts of the Navy and the contractor, or which are generated solely by the acts of the contractor.

3.2

The Navy shall have and use its generator number, and perform all generator duties under RCRA, for RCRA "hazardous wastes" which are generated solely by the Navy either prior to or during the course of ship repair work.

3.3

The Navy shall identify in writing each RCRA "hazardous waste" that the contractor will handle, treat or dispose of in performing the ship repair work.

3.3.1

The Navy shall specify each "hazardous waste's" RCRA identification number, its location on the ship, and the amount of the "hazardous waste" that the contractor will be responsible for handling, treating, or disposing of.

3.4

Unless a waste is identified by the Navy as a "hazardous waste," the contractor shall assume that the waste is not hazardous in handling, treating and disposing of the waste.

3.5

When the contractor deems it necessary, he shall chemically analyze a waste to determine if, and to what extent, that waste contains hazardous substances.

3.5.1

The Navy shall reimburse the contractor for any costs incurred in performing chemical analysis on any waste products that the contractor handles as a part of the ship repair work.

3.6

If chemical analysis demonstrates that a waste not identified in the contract is a "hazardous waste," then the contractor shall return the waste to the Navy for handling and disposal, or the contractor shall dispose of the hazardous waste in accordance with RCRA.

3.7

If the contractor disposes of the waste rather than return the waste to the Navy for handling and disposal, the Secretary of the Navy shall renegotiate the contract so that it fully includes all costs incurred by a contractor in handling, treating, or disposing of "hazardous wastes" which the Navy did not properly identify as hazardous or which the Navy failed to specify the actual quantity of the waste which the contractor handles, treats, or disposes of.

## CONTRACT CLAUSE

The disposal of hazardous wastes by the contractor shall be in accordance with the Resource Conservation and Recovery Act (RCRA) and all other applicable Federal, State and local laws, codes, ordinances and regulations.

Where the contractor disposes of hazardous wastes which are generated solely by Navy personnel, either prior to or during the performance of ship repair work, the Navy will use its generator number, assume all RCRA generator duties and indemnify the contractor for CERCLA and RCRA liability incurred by the contractor, as long as the contractor reasonably complies with applicable federal, state and local laws, codes, ordinances and regulations. Where the contractor disposes of hazardous wastes which are generated jointly by the acts of the Navy and the contractor, and the Navy requires the contractor to use its generator identification number and perform the duties of a generator under RCRA, the Navy shall indemnify the contractor for CERCLA and RCRA liability incurred by the contractor, as long as the contractor reasonably complies with applicable federal, state, and local laws, codes, ordinances and regulations. Where the contractor disposes of hazardous wastes generated solely by the contractor, the contractor will use its generator number and assume all RCRA generator duties.

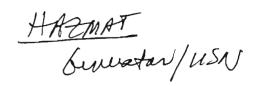
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1110 Vermont Avenue, N.W. Washington, D.C. 20005-3553 202-775-9060



October 26, 1988

To:

ENVIRONMENTAL CONTROL COMMITTEE

SHIP REPAIR COMMITTEE

Subject: EPA Opinion on Generator Number

For your information, attached is a memorandum prepared by outside counsel describing the Environmental Protection Agency response on the above-captioned subject. In a nutshell, EPA determined:

- If the private contractor is the generator or cogenerator of hazardous waste, the contractor may assume all the generator responsibilities;
- If the Navy is the sole generator of hazardous waste (the private contractor is not the generator of the waste), the Navy must use its generator identification number on the manifest form; and
- The Navy as generator of hazardous waste may delegate to the private contractor pre-transport, record keeping and reporting requirements.

W. Patrick Morris
Vice President &

General Counsel

Attachment

Collier, Shannon, Rill & Scott

Attorneys-at-Law

1055 Thomas Jefferson Street, N. W.

Washington, D. C. 20007

Telephone: (202) 342-8400 Writer's Direct Dial Number

MEMORANDUM

October 17, 1988

TO:

JOHN STOCKER, PRESIDENT

SHIPBUILDER'S COUNCIL OF AMERICA

FROM:

JOHN L. WITTENBORN

WILLIAM M. GUERRY

RE:

**EPA OPINION ON GENERATION STATUS** 

A recently promulgated Navy Standard Work Item requires all solicitations for ship repair work involving hazardous waste at contractor facilities to include a provision compelling private shipyards to use their Environmental Protection Agency (EPA) hazardous waste identification number ("generator" number) and assume "generator" duties under the Resource Conservation and Recovery Act ("RCRA") over all wastes generated by the Navy or by the contractor during the course of ship repair work. Under EPA's regulations, a "generator" is defined as "any person, by site, whose act or process produces hazardous wastes . . . or whose act first causes a hazardous waste to become subject to regulation." 40 C.F.R. § 260.10.

The Council has consistently opposed the Navy's attempt to shift responsibility and liability for hazardous waste disposal to private shipyards. On June 28, 1988, on behalf of the Shipbuilder's Council, we requested EPA to issue a formal legal opinion that the U.S. Navy, and not a private shipyard, is the "generator" responsible for performing "generator duties" when the Navy generates hazardous wastes that are subsequently removed at a private shipyard. Our letter identified several examples

where EPA previously designated marine vessels as the site where hazardous waste was generated. We argued that when Navy personnel (at sea or at the private shipyard) produce hazardous waste on board a naval vessel, the Navy vessel is the site at which that waste is generated and the Navy is the "person" whose act first causes the waste to become subject to regulation. Because the Navy is the sole generator of these wastes, private shipyards cannot, by law, use their EPA identification numbers to store or manifest those wastes for shipment.

In a very favorable response to our request, EPA issued the attached October 11, 1988 letter. EPA concludes that the Navy is the sole generator of hazardous waste produced solely by Navy personnel and that those wastes are already subject to regulation when removed by a private shipyard. When the private shipyard contractor simply handles or removes hazardous waste already subject to regulation, the contractor cannot be the generator of that waste and may not use its generator identification number to track the waste. In the future, the Navy will be required to use its generator identification number on all manifest forms covering hazardous wastes solely generated by Navy personnel. Contractor facilities will not be allowed to store this Navygenerated waste without permits. This EPA opinion letter is a significant step forward in our ongoing effort with the Navy to resolve the issue of liability for hazardous waste handling and disposal in Navy solicitation contracts.

Please contact us directly if you have any questions or concerns on this matter.

Attachment

cc: W. Patrick Morris



# UNITED STATES ENVIRONMENTAL PROTECTION AGENCY WASHINGTON, D.C. 20460

307 | 1 1 200

OFFICE OF GENERAL COUNSEL

Mr. William M. Guerry Collier, Shannon, Rill & Scott Attorneys-at-Law 1055 Thomas Jefferson Street, N.W. Washington, D.C. 20007

Dear Mr. Guerry:

You have requested an opinion regarding whether the Navy may require contractors to assume the responsibilities of a hazardous waste generator. In summary, if the contractor is a generator or co-generator of the waste, the contractor may assume all the generator responsibilities. If, on the other hand, the contractor is not a generator of the waste, the Navy's EPA generator identification number must be used (in manifesting and recordkeeping requirements, for example) but the contractor may assume the recordkeeping, manifesting, and pre-transport requirements.

#### What Generator Responsibilities May be Assumed

#### Generator Identification Numbers

Under 40 CFR § 262.12 a generator must not treat, store, dispose of, transport, or offer for transportation, hazardous waste without having received an EPA identification number. The purpose of this requirement is to provide EPA with notification of who is generating hazardous waste. If a contractor were to be allowed to have a generator number instead of the generator itself, the manifests and reports would not identify the generator of the waste. Consequently, the Navy must have received a generator identification number where it is the sole generator of the waste. If there is more than one generator of the waste it is EPA's long-standing policy that either generator may obtain the generator identification number. 45 Fed. Reg. 72024, 72026 (October 30, 1980).

#### Manifesting Requirements

You have argued that a contractor cannot assume certain generator manifesting responsibilities required by § 262.20.

Specifically, you point to Item 16 on the manifest form. Item 16 requires a generator to certify, by his signature, (1) that the manifest accurately describes the waste and (2) that the generator has in place a waste minimization program. The Appendix to Part 262 sets out the instructions for completing the manifest form. The instructions for the certification, Item 16, specifically allow for a signature to be "on behalf of" a generator. 40 CFR Part 262, Appendix, and see 51 Fed. Reg. 35192, October 1, 1986. This language allows the generator to authorize someone, including a contractor, to sign the certification. The contractor and the generator should establish the means to ensure that the contractor is properly authorized to sign on behalf of the generator.

#### Pre-Transport, Recordkeeping, and Reporting Requirements

Subparts C and D of Part 262 delineate the generator's pretransport, recordkeeping and reporting requirements. The purpose of the regulations is to ensure that wastes are properly packaged and reported. EPA believes that delegation of these responsibilities will not affect the proper packaging or reporting of the waste because the generator must be identified on the manifest, and the generator will remain responsible for proper fulfillment of these requirements, no matter who performs them. Because the regulations do not explicitly address the issue, and the purpose of the requirements can be equally-well fulfilled by contractors, the requirements of Subparts C and D may be delegated.

#### Who is the Generator?

In some cases, a contractor will in fact be the generator of a particular hazardous waste. EPA's regulations define a generator as "any person, by site, whose act or process produces hazardous waste . . . or whose act first causes a hazardous waste to become subject to regulation." 40 CFR 260.10. I cannot give you one simple answer regarding whether your clients are generators of waste, because such determinations are too fact-specific. I can give some general rules that may assist you.

#### When the waste is produced at sea

When the Navy produces hazardous waste at sea that waste is subject to regulation as soon as it is produced unless it is in an exempt unit such as a product or raw material storage tank, product or raw material vehicle or vessel, or a manufacturing process unit or an associated non-waste-treatment manufacturing unit. 40 CFR 261.4. If the waste is not exempt from regulation when produced at sea by the Navy, then the Navy is the sole generator of the waste.

If the material is not regulated until it is removed from a vessel, then the contractor is a co-generator of waste if the contractor removes the waste. In such a case the contractor's act first subjects the waste to regulation, and he therefore is a generator. If the contractor simply carries material that is already subject to regulation off the ship, the contractor cannot be the generator of the hazardous waste, because he neither produces it nor makes it subject to regulation—it is already subject to regulation. Instead, the contractor is a transporter of the waste, or is preparing the waste for transport on behalf of the generator.

#### When the Waste is Produced in the Dockyard of the Contractor

The analysis does not change if the waste is produced at the dockyard. The question is still whether any act or process of the contractor makes it a generator. "Acts" may include such things as the ownership of the materials from which the waste is generated, operation of the units in which the waste is generated, or removal of waste from the process in which it is generated. See 45 Fed. Reg. 72024 at 72026. If the contractor's actions do not help produce the waste and do not cause it to be first subject to regulation, then the contractor is not a generator, may not take advantage of the accumulator provisions (40 CFR 262.34), and may not use its generator identification number to track the waste.

Finally, I would advise you that the Agency is currently considering changing the regulations governing the generation of waste on board vessels. If we should do so there will be an opportunity for your clients to comment on the proposed rule(s). I hope this answer has been of help to you, please call me if you have any further questions.

Sincerely,

Attorney

Solid Waste and Emergency Response Division (LE-132S)

## Coilier, Shannon, Rill & Scott Attorneys-at-Law

1055 Thomas Jefferson Street, N. W. Washington, D. C. 20007

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November 23, 1988

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W. Patrick Morris, Esquire Vice President and General Counsel Shipbuilders Council of America 1110 Vermont Avenue, N.W. Washington, D.C. 20005

Re:

Navy Hazardous Waste Generator Responsibilities

Dear Pat:

Enclosed is a letter from Keith Eastin which provides the Navy's response to our letter regarding the Environmental Protection Agency's opinion on the use of Navy hazardous waste identification numbers to describe wastes produced on board Navy vessels. As you can see, the Navy ascribes a very narrow reading to EPA's letter. Nevertheless, that letter has obviously had a positive effect and Secretary Eastin is now requesting another meeting to discuss and resolve the remaining issues.

Please let me know when you and John Stocker will be available for such meeting. This time, I suggest that we invite the Navy representatives to your offices and that we also invite either George Curtis or the Chairman of the Contracts Committee.

I hope you have a happy Thanksgiving.

Sincerely,

John L. Wittenborn

Enclosure



#### DEPARTMENT OF THE NAVY

OFFICE OF THE ASSISTANT SECRETARY (SHIPBUILDING AND LOGISTICS) WASHINGTON, D.C. 20360

NOV 15 1988

John L. Wittenborn, Esquire Collier, Shannon, Rill and Scott 1055 Thomas Jefferson Street, N.W. Washington, D.C. 20007

Re: Hazardous Waste Generator Responsibilities

Dear Mr. Wittenborn:

This is in response to your letter of 17 October 1988, regarding the concerns of the Shipbuilder's Council of America (SCA) on the Navy's management of hazardous waste disposal during ship overhauls and repairs. As you know from our discussions with you, members of SCA, and other shipbuilders, the Navy is anxious to reach a reasonable and satisfactory resolution of this issue. The repetitious exchange of arguments and letters has gone on much too long. We propose, therefore, a meeting between appropriate Navy representatives and members of the shipbuilding community, including SCA and yourself, to discuss in an open forum our concerns and requirements. Please advise us as to when you might be available for such a meeting.

Your latest letter and your earlier letter of 14 September 1988, raise a few issues that require a response now in order to facilitate any future communications on this issue. The letter you attached from Ms. Regas in the Office of Solid Waste and Emergency Response Division of the Environmental Protection Agency (EPA) Office of General Counsel is for the most part consistent with the representations made by senior EPA staff to the Navy. The characterization of the manifesting and recordkeeping requirements as administrative responsibilities subject to delegation to a contractor is entirely consistent with the Navy's position. As Ms. Regas noted, we are working with EPA to clarify the application of 40 C.F.R. § 261.4 to Navy vessels. Even under the most restrictive interpretation of the regulations as currently worded, the only time there is an issue under the view presented by Ms. Regas is for waste generated solely by Navy personnel prior to the availability. This is certainly a limited amount of waste and the Navy is reviewing its options, other than clarifying the regulations, for dealing with this waste.

We trust that having reached agreement on the large portion of the problems posed by generation and disposal of hazardous waste from the overhaul and repair of Navy ships that we can resolve the remaining issues. We are reviewing your resubmission of proposed revisions to the standard work item and will take your suggestions to the Committee responsible for drafting and revising standard work items. As we explained in an earlier

meeting, there is a set format for standard work items and your submission does not follow the format. The standard work item is a recognized part of a ship repair contract that defines the work to be performed by the contractor and provides any necessary guidance or directions on performance of the work. A standard work item must be complete on its face, it cannot refer to a list to be prepared later in time that identifies the requirements of performance. The purpose of the contract clause is to state, or restate, the respective liabilities of the parties as generators of waste under the Resource Conservation and Recovery Act. We look forward to your assistance in refining the standard work item and the contract clause, and in identifying waste generated solely by the contractor in performance of the contract.

Sincerely,

KEITH E EASTIN

PRINCIPAL DEDUTY
ASSISTANT GEORET COUNTY
(SHIPEOGLETICS)